

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Request for Review of a
Decision of the
Universal Service Administrator by
Eagle Hill School
Hardwick, Massachusetts
Schools and Libraries Universal Service
Support Mechanism
File No. SLD-84941
CC Docket No. 02-6

ORDER

Adopted: December 15, 2017

Released: December 15, 2017

By the Chief, Telecommunications Access Policy Division, Wireline Competition Bureau:

1. In this order, we deny the request for review filed by Eagle Hill School (Eagle Hill) appealing a decision by the Universal Service Administrative Company (USAC) to seek the recovery of E-rate funds.1 USAC’s recovery action was commenced after the Wireline Competition Bureau (Bureau) issued an order concluding that Eagle Hill had purchased internal connections for ineligible residential school dormitory buildings for funding year 1998.2 In denying Eagle Hill’s instant request for review, we find that: (1) USAC’s effort to recover the support at issue was not time-barred; (2) the Commission’s 2010 expansion of eligibility for support to cover applicants like Eagle Hill was not retroactive to funding year 1998; and (3) Eagle Hill is not exempt from a 2004 policy concerning which party is liable for rule violations. We, therefore, direct USAC to continue its recovery action, consistent with this Order.

2. Background. Eagle Hill serves children with learning disabilities who live in dormitories on campus.3 While most of the learning takes place in instructional facilities separate from the students’ living quarters, there are structured study hall periods held in the students’ dormitories at least two hours each night.4 When preparing its application for E-rate support for funding year 1998, Eagle Hill emailed USAC to inquire about whether internal connections to individual student dormitory rooms would be

1 See Letter from Donna Salvidio, Eagle Hill School, to Federal Communications Commission, CC Docket No. 02-6 (filed Dec. 21, 2011) (Request for Review). Section 54.719(c) of the Commission’s rules provides that any person aggrieved by an action taken by a division of USAC may seek review from the Commission. 47 CFR § 54.719(c); Letter from USAC, Schools and Libraries Division, to Chris Hynes, Eagle Hill School (dated Aug. 23, 2011) (2011 Commitment Adjustment Letter). The E-rate program is more formally known as the schools and libraries universal service support mechanism.

2 Requests for Review of the Decisions of the Universal Service Administrator by Eagle Hill School et al; Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, Order, 24 FCC Rcd 12714, 12718, para. 7 (WCB 2009) (finding that the use of a dormitory room for tutoring for two hours a night did not qualify Eagle Hill for E-rate support) (2009 Eagle Hill Order).

3 See Request for Review at 4.

4 Id. at 2.

eligible for E-rate support.<sup>5</sup> A USAC employee responded that, because Eagle Hill conducted study sessions in the dormitories, its situation was unique, and there was a possibility that the dormitories were “acting classrooms” eligible for E-rate funding.<sup>6</sup> The USAC employee recommended that Eagle Hill attach an explanation of this unique situation to its FCC Form 471 application for funding.<sup>7</sup>

3. On February 9, 1999, Eagle Hill was granted \$77,430 in support for internal connections to its dormitories.<sup>8</sup> USAC later determined that the internal connections at issue were ineligible because Eagle Hill was using the funding to connect individual student dormitory rooms that did not qualify for E-rate support.<sup>9</sup> On January 5, 2001, USAC sent a commitment adjustment letter (COMAD) to Eagle Hill and its service provider, Drahthaus, seeking recovery of the disbursed funding solely from Drahthaus.<sup>10</sup> Eagle Hill appealed the COMAD to USAC.<sup>11</sup> That appeal was denied on March 29, 2001.<sup>12</sup> On April 18, 2001, Eagle Hill filed a request for review with the Commission.<sup>13</sup>

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<sup>5</sup> See Letter from USAC, Schools and Libraries Division, to Chris Hynes, Eagle Hill School (Feb. 9, 1999).

<sup>6</sup> See Email from USAC, Schools and Libraries Division to Christopher Hynes, Director of Development, Eagle Hill School (Apr. 10, 1998 17:13:58) (“Since your unique setting and need for services extends beyond a traditional classroom setting – an association can be made to indicate that the dormitories are ‘acting’ classrooms during the two hours per evening you cited – and therefore would meet the definition of eligible . . . please indicate this unique situation as an attachment to your completed form 471 application”).

<sup>7</sup> *Id.* There is nothing in the record indicating that Eagle Hill attached any explanation to its funding year 1998 application addressing the eligibility of internal connections to individual student dormitory rooms, nor does Eagle Hill claim to have done so in its request for review.

<sup>8</sup> FCC Form 471 Application Number 84941, FRN 85128 (funding year 1998).

<sup>9</sup> See Letter from USAC, Schools and Libraries Division, to Chris Hynes, Eagle Hill School (dated Jan. 5, 2001) (COMAD Letter). USAC’s decision was based on *Request for Review by Anderson School, Federal-State Joint Board on Universal Service; Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, CC Docket Nos. 96-45 and 97-21, Order, 15 FCC Rcd 25610, 25612, paras. 6-7 (CCB 2000). That decision concluded that internal connections for study centers in dormitories were not eligible for E-rate support because: (a) the study centers were neither traditional classrooms nor computer learning centers; (b) the dormitory buildings at issue were physically separated from the school’s classrooms; and (c) the requested internal connections were not necessary for the effective transport of information to the classrooms. *Id.* (citing *Federal-State Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9020, para. 459 (1997) (“[A] given service is eligible for support as a component of the institution’s internal connections only if that piece of equipment is necessary to transport information all the way to individual classrooms”) (subsequent history omitted); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Fourth Order on Reconsideration, Report and Order, CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, 13 FCC Rcd 5318, 5440, paras. 209-210 (1997) (“[W]e modify our rules to reflect that support is not available for internal connections in non-instructional buildings used by a school district unless those internal connections are essential for the effective transport of information within instructional buildings or buildings used by a library for strictly administrative functions”).

<sup>10</sup> See COMAD Letter. Prior to July 2004, any monetary recovery required due to a rule violation by either the applicant or the service provider was sought exclusively from the service provider. See *Changes to the Board of Directors for the National Exchange Carrier Assoc., Inc., Federal-State Joint Board on Universal Service*, CC Docket Nos. 97-21, 96-45, Order, 14 FCC Rcd 27090, 27093, para. 8 (1999).

<sup>11</sup> See Letter from Margaret Hurley, Eagle Hill School, to USAC, Schools and Libraries Division (dated Feb. 2, 2001).

<sup>12</sup> See Letter from USAC, Schools and Libraries Division, to Margaret Hurley, Eagle Hill School (dated Mar. 19, 2001).

<sup>13</sup> See Letter from Margaret Hurley, Eagle Hill School to Federal Communications Commission, CC Docket No. 02-6 (filed Apr. 18, 2001).

4. In July 2004, the Commission issued its *Fourth Report and Order*, which revised the requirement that all monetary recoveries due to rule violations (whether committed by the applicant or the service provider) be sought exclusively from the service provider.<sup>14</sup> Specifically, the Commission directed USAC to pursue recovery actions against the party or parties that committed the rule or statutory violation in question, recognizing that, in some instances, this would be the applicant school or library rather than the service provider.<sup>15</sup> The Commission directed that its new recovery policy “apply on a going forward basis to all matters for which USAC has not yet issued a demand letter as of the effective date of this order, and to all recovery actions currently under appeal to either USAC or this agency.”<sup>16</sup> At that time, Eagle Hill’s request for review filed with the Commission on April 18, 2001 was still pending.

5. In 2009, the Bureau denied Eagle Hill’s appeal, finding that the use of a dormitory room for tutoring for two hours a night did not qualify it for E-rate support.<sup>17</sup> In 2011, using the Commission’s revised recovery standards, USAC issued a revised COMAD seeking to recover the entire \$77,430 from Eagle Hill, rather than its service provider.<sup>18</sup> Eagle Hill appealed that COMAD decision to USAC and USAC denied its appeal.<sup>19</sup> Eagle Hill now appeals the COMAD to the Commission.<sup>20</sup>

6. Eagle Hill raises three arguments on appeal.<sup>21</sup> First, it asserts that its debt is time-barred by a five-year statute of limitations that it claims was established by the Commission’s 2004 *Fifth Report and Order*, as well as the Debt Collection Improvement Act (DCIA).<sup>22</sup> Second, it contends that its funding year 1998 purchase is eligible for E-rate support under the standard for residential schools serving certain unique populations stated in the *Sixth Report and Order*, which was issued in 2010.<sup>23</sup> Eagle Hill argues that that standard should be applied retroactively because it is consistent with guidance that the school received from USAC in 1998.<sup>24</sup> Third, Eagle Hill asserts that USAC is estopped from recovering the debt because, as late as 2011, a USAC employee expressly stated that USAC was seeking recovery solely from the service provider.<sup>25</sup>

7. *Discussion.* We deny Eagle Hill’s appeal. First, we reject its position that the debt to be

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<sup>14</sup> *Federal-State Joint Board on Universal Service, Changes to the Board of Directors for the National Exchange Carrier Assoc., Inc., Schools and Libraries Universal Service Support Mechanism*, CC Docket Nos. 96-45, 97-21, 02-6, Order on Reconsideration and Fourth Report and Order, 19 FCC Rcd 15252 (2004) (*Fourth Report and Order*).

<sup>15</sup> *Fourth Report and Order*, 19 FCC Rcd at 15255, para. 10.

<sup>16</sup> *Id.*

<sup>17</sup> *2009 Eagle Hill Order*, 24 FCC Rcd at 12718, para. 7.

<sup>18</sup> Letter from USAC, Schools and Libraries Division, to Chris Hynes, Eagle Hill School (dated Aug. 23, 2011).

<sup>19</sup> See Letter from Donna Salvidio, Eagle Hill School, to USAC, Schools and Libraries Division (dated Sept. 26, 2011); Letter from USAC, Schools and Libraries Division, to Donna Salvidio, Eagle Hill School (dated Oct. 26, 2011).

<sup>20</sup> Affected parties must contest decisions by USAC or the Commission within the time allotted under our rules and cannot later raise arguments unrelated to the USAC or the Commission determination at issue. If Eagle Hill wished to challenge the eligibility determinations made in the *2009 Eagle Hill Order*, it was required to do so in a petition for reconsideration filed within 30 days of that order. See 47 CFR §§ 1.106(f), 1.115(d); see also 47 CFR § 1.4(b)(2) (setting forth the method for computing the amount of time within which persons or entities must act in response to deadlines established by the Commission). Accordingly, to the extent that its request for review seeks reconsideration of determinations made in the *2009 Eagle Hill Order*, rather than review of USAC’s issuance of the COMAD in 2011, we reject the arguments as untimely.

<sup>21</sup> See Request for Review at 3-5.

<sup>22</sup> *Id.* at 3 (citing *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Fifth Report (continued....))

recovered pursuant to the COMAD is time-barred by a statute of limitations established by the *Fifth Report and Order* and the DCIA.<sup>26</sup> As an initial matter, the Commission has concluded that the *Fifth Report and Order* stated a policy preference that investigations be completed within five years of the final delivery of service for a specific funding year, and that the policy preference is not an absolute bar to recovery (i.e., it is not a statute of limitations).<sup>27</sup> In any case, the policy preference has been satisfied here. USAC informed Eagle Hill of the results of its completed investigation and sought recovery of funds in 2001,<sup>28</sup> well within five years of final delivery of service for its funding year 1998 purchase. Further, the *Fifth Report and Order* stated that the policy preference of completing investigations within five-years “should go into effect for Funding Year 2004.”<sup>29</sup> Here, the funding request at issue is from funding year 1998. Accordingly, even if the policy preference had not been met, it would not apply in this case.

8. Eagle Hill’s argument that the COMAD is barred by a statute of limitations in the DCIA is also meritless.<sup>30</sup> The statute that Eagle Hill relies upon establishes a limitations period for contract claims brought by the United States,<sup>31</sup> not administrative recoveries of improperly disbursed government funds. “USAC’s recovery of government funds paid to an applicant or service provider who has no just right to keep the funds is not barred by the passage of time.”<sup>32</sup>

9. Second, we reject Eagle Hill’s next argument that its purchase of internal connections for individual dormitory rooms should be deemed eligible because the *Sixth Report and Order* made dorms in residential schools serving certain unique populations, like those at Eagle Hill, eligible for E-rate

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and Order and Order, 19 FCC Rcd 15808, 15818-19, para. 32 (2004) (*Fifth Report and Order*); 28 USC § 2415(a).

<sup>23</sup> See *Schools and Libraries Universal Service Support Mechanism, A National Broadband Plan for Our Future*, CC Docket No. 02-6, GN Docket No. 09-51, Sixth Report and Order, 25 FCC Rcd 18762, 18777-79, paras. 28-32 (2010) (*Sixth Report and Order*) (extending E-rate eligibility to dorms in residential schools serving unique populations because the services to those dorms would be used primarily, if not exclusively, for educational purposes).

<sup>24</sup> See Request for Review at 3-4.

<sup>25</sup> Request for Review at 4-5.

<sup>26</sup> *Fifth Report and Order*, 19 FCC Rcd at 15818-19, para. 32.

<sup>27</sup> See *Application for Review of a Decision of the Wireline Competition Bureau by Net56, Inc.; Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Memorandum Opinion and Order, 32 FCC Rcd 963, 966-67, paras. 9-11 (2017) (*Net56 Order*) (clarifying that the Commission’s recommendation that investigations be completed within five years of the final delivery of service for a specific funding year is a policy preference and not an absolute bar to recovery).

<sup>28</sup> See *supra* note 9.

<sup>29</sup> *Fifth Report and Order*, 19 FCC Rcd at 15819, para. 32.

<sup>30</sup> Request for Review at 3.

<sup>31</sup> 28 U.S.C. § 2415(a)

<sup>32</sup> *Request for Review of Decisions of the Universal Service Administrator by Joseph M. Hill Trustee in Bankruptcy for Lakehills Consulting, LP*, CC Docket No. 02-6, Order, 26 FCC Rcd 16586, 16601, para. 28 (2011) (citing *United States v. Wurts*, 303 U.S. 414, 416 (1938) (“Ordinarily, recovery of Government funds, paid by mistake to one having no just right to keep the funds, is not barred by the passage of time”)); see also *United States v. Domino Sugar Corp.*, 349 F.3d 84, 88 (2d Cir. 2003) (recognizing that the recovery of improperly disbursed government funds is not subject to any statute of limitations unless Congress specifically states otherwise).

support.<sup>33</sup> The Commission did not articulate that policy until 2010, more than a decade after Eagle Hill submitted its funding year 1998 funding request. In issuing the new policy, the Commission did not direct us to apply it retroactively. To the contrary, the language of the *Sixth Report and Order* indicates that the new policy should be applied prospectively.<sup>34</sup> That result is not changed by the fact that Eagle Hill received an email from a USAC employee in 1998 concerning the eligibility of its dorms for E-rate support. To the extent that the email suggested that Eagle Hill's dorms might be eligible for E-rate support as "acting classrooms,"<sup>35</sup> we have already concluded that Eagle Hill did not take the steps necessary to obtain a definitive decision from USAC on that subject, as specified in the email.<sup>36</sup> Even if it were otherwise, the Commission has made clear that applicants have the ultimate responsibility of knowing and complying with all relevant rules and procedures, and alleged incorrect or inconsistent advice concerning those rules and procedures from USAC employees does not obviate that obligation or justify a waiver of the Commission's rules.<sup>37</sup>

10. Finally, Eagle Hill claims that USAC is estopped from seeking recovery because, as late as 2011, a USAC employee expressly stated that USAC was seeking recovery solely from the service provider.<sup>38</sup> While it is unfortunate if Eagle Hill received inaccurate information from a USAC employee, such misinformation does not prevent the Commission from acting based on its current policies.<sup>39</sup> As explained above, in the *Fourth Report and Order*, the Commission modified its policy to seek recovery from the party or parties that committed the rule or statutory violation in question,<sup>40</sup> which, in this case, USAC concluded was Eagle Hill.

11. For the reasons explained above, we reject Eagle Hill's arguments for why it should not have to repay the \$77,430, and direct USAC to continue its efforts to recover those funds.

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<sup>33</sup> See *Schools and Libraries Universal Service Support Mechanism, A National Broadband Plan for Our Future*, CC Docket No. 02-6, GN Docket No. 09-51, Sixth Report and Order, 25 FCC Rcd 18762, 18777-79, paras. 28-32 (2010) (*Sixth Report and Order*) (extending E-rate eligibility to dorms in residential schools serving unique populations because the services to those dorms would be used primarily, if not exclusively, for educational purposes).

<sup>34</sup> The policy is announced in a section headed "*Expanding Access for Residential Schools that Serve Unique Populations.*" *Id.* at 18777 para. 28 (emphasis added). Later in the section, the Commission explains that it wants "to proceed in a conservative fashion . . . to limit the potential impact of this revision on the E-rate program as we consider additional upgrades to the program," noting that "we continue to be mindful of the potential impact of our reforms on the E-rate funding cap." *Id.* at 18779, para. 32 & n.102.

<sup>35</sup> See *supra* note 6.

<sup>36</sup> See *2009 Eagle Hill Order*, 24 FCC Rcd at 12716, para. 4, note 15 (stating that "the USAC employee directed Eagle Hill in the email to 'indicate [its] unique situation as an attachment to' its FCC Form 471 application" and that "[b]ased on the record, it does not appear that Eagle Hill provided such an attachment to its FCC Form 471").

<sup>37</sup> See, e.g., *Requests Waiver of Decisions of the Universal Service Administrator by Ada School District; Schools and Libraries Universal Support Mechanism*, CC Docket No. 02-6, Order, 31 FCC Rcd 3834, 3837, para. 10 (WCB 2016); *Request for Review of Sacred Heart School; Schools and Libraries Universal Support Mechanism*, CC Docket No. 02-6, Order, 20 FCC Rcd 8162, 8164, para. 8 (WCB 2005).

<sup>38</sup> See *supra* note 25.

<sup>39</sup> See, e.g., *Request for Review of Sacred Heart School; Schools and Libraries Universal Support Mechanism*, CC Docket No. 02-6, Order, 20 FCC Rcd 8162, 8164, para. 8 (WCB 2005) (noting that applicants have the ultimate responsibility of complying with all relevant rules and procedures, and alleged incorrect or inconsistent advice concerning those rules and procedures from USAC employees does not obviate that obligation or justify a waiver of the Commission's rules).

<sup>40</sup> See *supra* para. 4.

12. ACCORDINGLY, IT IS ORDERED, pursuant to the authority contained in sections 1-4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, and pursuant to authority delegated in sections 0.91, 0.291, and 54.722(a) of the Commission's rules, 47 CFR §§ 0.91, 0.291, and 54.722(a), that the request for review filed by Eagle Hill School IS DENIED.

13. IT IS FURTHER ORDERED, pursuant to section 1.102(b)(1) of the Commission's rules, 47 CFR § 1.102(b)(1), that this order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Ryan B. Palmer  
Chief  
Telecommunications Access Policy Division  
Wireline Competition Bureau